

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASSOCIATION OF MINORITY	:	CIVIL ACTION
CONTRACTORS AND SUPPLIERS,	:	
"AMCAS, INC."	:	
	:	
v.	:	
	:	
HALLIDAY PROPERTIES,	:	
INC., <u>et al.</u>	:	NO. 97-274

**MEMORANDUM AND ORDER**

BECHTLE, J.

October 21, 1997

Presently before the court is defendants Halliday Properties, Inc., Mark H. Dambly, J.J. DeLuca Company, Inc., and Jefferis Square Housing Partnership's (collectively "Defendants") motion to dismiss the Complaint of plaintiff Association of Minority Contractors and Suppliers, "AMCAS, Inc." ("AMCAS") pursuant to Federal Rule of Civil Procedure 12(b)(6) and AMCAS' response thereto. For the reasons set forth below, Defendants' motion will be granted.<sup>1</sup>

**I. BACKGROUND**

The facts of this case, as alleged by AMCAS, arise from violations of section 1 of the Sherman Act.<sup>2</sup> Plaintiff AMCAS is an organization of minority owned businesses which submit bids to

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1. In their Motion, Defendants ask the court to grant the motion to dismiss with prejudice. The court will grant the motion to dismiss, but without prejudice and with leave to amend.

2. This court has original jurisdiction over Plaintiffs' claims because they arise under the federal antitrust laws. 28 U.S.C. § 1331; 28 U.S.C. § 1337(a).

become general contractors on construction projects. Defendants are an individual, a partnership and two corporations involved in construction activities which are the subject of the antitrust violations AMCAS alleges.

The facts alleged surround a construction project to be completed in the city of Chester, Pennsylvania. Defendant Mark H. Dambly ("Dambly") is a "developer of various construction projects throughout Delaware County, Pennsylvania." (Compl. ¶ 5.) Dambly is the owner of Halliday Properties, Inc. Halliday Properties, Inc., is alleged to be the alter ego of Dambly. Dambly is also a partner in the Jefferis Square Housing Partnership ("Partnership").

The Partnership purchased a tract of land in Chester for the construction of a housing development and hired Defendant J.J. DeLuca Company, Inc., to be the "project manager" on development of the property. Defendants received federal funding for this development project. In addition to the above defendants, several entities not named as defendants "have participated as co-conspirators in the [antitrust] violations alleged herein and have performed acts and made statements in furtherance thereof." Id. ¶ 8.

The Complaint does not specify what role AMCAS played or wished to play in the construction project or the bidding process. Presumably, AMCAS bid to become a contractor on the project and was not chosen in the bidding process. The Complaint is also unclear as to how AMCAS was denied a part in the project.

Two factual allegations are made. First, AMCAS claims Defendants somehow participated in "dissolving the legitimate municipal authority" that distributed and oversaw the use of federal funding housing developments. Id. ¶ 12(a). AMCAS also claims that Defendants failed to use multiple prime contractors in violation of an unnamed Pennsylvania law. These actions were all part of a "combination and conspiracy to fix, raise, maintain and stabilize [Defendants'] control of the market of federal funds available to them." Id. ¶ 12.

On January 13, 1997, AMCAS filed their Complaint alleging that Defendants violated section 1 of the Sherman Act. On May 2, 1997, Defendants filed a motion to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). On June 20, 1997, AMCAS filed a response to Defendants' motion.<sup>3</sup>

For the reasons set forth below, the Complaint will be dismissed without prejudice, with leave to amend.

## **II. STANDARD FOR MOTION TO DISMISS**

For the purposes of a motion to dismiss, the court must accept as true all well-pleaded allegations of fact in the plaintiff's complaint, construe the complaint in a light most favorable to the plaintiff and determine whether "under any reasonable reading of the pleadings, the plaintiff may be

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3. The court notes Defendants have filed a reply memorandum and AMCAS has filed a sur-reply memorandum. The Local Rules do not authorize such filings. The parties must seek leave of court for any reply and sur-reply briefs they wish to file with the court.

entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989) (citations omitted). The court, however, need not accept as true legal conclusions or unwarranted factual inferences. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). If "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," the complaint will be dismissed. Conley, 355 U.S. at 45.

### **III. DISCUSSION**

Defendants have filed this motion to dismiss on the basis of a failure to state a claim under the Sherman Act and lack of standing. Defendants argue that AMCAS fails to state a claim because (a) there is no plurality of actors as required for a conspiracy; (b) the Defendants' activities as alleged do not state a violation of the Sherman Act; (c) the Complaint fails to state a legally cognizable relevant market and Defendants' market power in the relevant market; and (d) there is no antitrust injury alleged. Defendants argue that there is no standing because AMCAS does not participate in the market in which the claim arises. Plaintiffs counter that they have properly alleged each of the above elements of an antitrust violation and refer to paragraphs in the Complaint for support.

Under "notice pleading," a plaintiff must set forth a short and plain statement of their claim. Fed. R. Civ. P. 8. However, even under this liberal rule, a plaintiff must still

"give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957). The difficulty with plaintiff's Complaint is that it fails to plead the primary factual premise that is the basis for the claim. Instead, the Complaint makes legal conclusions without setting forth any factual basis for the conclusions. For the purpose of this motion to dismiss, the court must accept such facts as AMCAS alleges as true. However, AMCAS must plead certain control facts upon which the claim can rest. The court can not and will not hypothesize what facts may be in plaintiff's mind as those that could have occurred, or what undisclosed activities could have violated the Sherman Act.

In failing to properly plead its claim, AMCAS does not plead the following required elements of a section 1 Sherman Act cause of action: "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action." Mathews v. Lancaster General Hospital, 87 F.3d 624, 639 (3d Cir. 1996); see also Queen City Pizza, Inc. v. Domino's Pizza, Inc., No. 96-1638, 1997 WL 526215, at \*48 (3d Cir. Aug. 27, 1997)(citing Mathews and other precedent). To avoid a dismissal with prejudice, AMCAS' amended Complaint must properly plead all necessary allegations and facts required by the law even under the doctrine of notice pleading.

Blanket conclusions of law will not suffice to satisfy the pleading standard.

The court agrees with Defendants that the Complaint, as presently drafted, fails to state a claim under the Sherman Act. Because the Complaint alleges few facts on which the antitrust claims can be evaluated, the court is unable to determine whether AMCAS can plead a valid Sherman Act claim. Accordingly, the court will not allow the plaintiff's claim to stand until, and only if it amends the Complaint to properly allege a Sherman Act violation within the time to be provided.

#### **IV. CONCLUSION**

For the reasons set forth above, Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) will be granted in part and denied in part.

An appropriate Order follows.

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**ORDER**

AND NOW, TO WIT, this 21st day of October, 1997, upon consideration of Defendants' Joint Motion to Dismiss Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and plaintiff AMCAS' response thereto, IT IS ORDERED that said motion is GRANTED. AMCAS' Complaint is DISMISSED without prejudice. AMCAS is GRANTED leave to amend its Complaint within twenty (20) days from the date of this order. No extensions of this twenty day period will be granted.

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LOUIS C. BECHTLE, J.